Before the
Administrative Hearing Commission
State of Missouri

COMMERCIAL BARGE LINE COMPANY and AMERICAN COMMERCIAL BARGE LINE LLC, n/k/a AMERICAN COMMERCIAL LINES, LLC,[1]	)	
Petitioners,	)	
vs.	)	No. 09-0723 RS
DIRECTOR OF REVENUE,	)	
Respondent.	)	

DECISION

Commercial Barge Line Company ("CBL") and American Commercial Barge Line, LLC ("ACBL") (together, "Petitioners") are liable for $58,515.15 in sales and use tax; $2,925.76 in additions; and interest as provided by law.

Procedure

On May 20, 2009, ACBL filed a complaint appealing assessments made by the Director. We opened the case as case no. 09-0723 RS. The Director of Revenue ("the Director") filed an answer on June 12, 2009. ACBL amended its complaint on October 27, 2009. The Director answered the amended complaint on November 3, 2009.

[1] ACBL filed its complaint with its name styled in this manner. The evidence in this case suggests that American Commercial Lines LLC is an entirely separate company, not a successor to ACBL. See Pet. Exs. 75 and 76, as reflected in our findings of fact 4, 5, and 6. However, we have preserved the caption of this case as filed by ACBL.

On September 14, 2010, CBL filed a complaint appealing assessments made by the Director. We opened that complaint as case no. 10-1793 RS, and the Director filed an answer on October 18, 2010.

ACBL filed a second amended complaint on October 13, 2010, which the Director answered on October 21, 2010. On November 12, 2010, ACBL filed a motion to consolidate its case with case no. 10-1793 RS. We consolidated the cases on December 2, 2010. Petitioners filed a third amended complaint on December 17, 2010, and the Director filed an answer on January 19, 2011.

Petitioners filed a motion for summary decision with supporting affidavits and exhibits and suggestions in support on July 20, 2011. The Director filed a response and a cross motion for summary decision with his own authenticated records on August 31, 2011. Petitioners filed a response to the Director's cross motion on October 6, 2011. The Director filed a response to Petitioners' response on October 24, 2011. By order dated May 1, 2012 ("the 2012 order"), we denied Petitioners' motion and the Director's cross-motion.

We held a hearing on August 3, 2012. Janette M. Lohman and James W. Erwin, both of Thompson Coburn LLP, represented the Petitioners. Christopher R. Fehr represented the Director. The case became ready for our decision on November 19, 2012, the date the last written argument was filed.

Findings of Fact

Parties and Affiliates

1. ACBL is a single-member Delaware limited liability company in good standing with its principal place of business in Jeffersonville, Indiana. It is wholly owned by another limited liability company, American Commercial Lines, LLC ("ACL"). Louisiana Dock Company

LLC[2] ("Louisiana Dock" or "LDC") is also a single-member Delaware limited liability company wholly owned by ACL.

2. ACBL is engaged in the business of operating line haul towboats that transport cargo in barges in interstate commerce on the inland waterways of the United States. The line haul towboats do not receive any services directly from the State of Missouri.

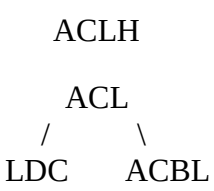
3. Louisiana Dock is engaged in the business of providing barge shifting and fleeting services, and boat and barge repair services to ACBL.

4. Prior to January 10, 2005, ACL was wholly owned by another single member LLC, American Commercial Lines Holdings ("ACLH"). After that date, ACL was wholly owned by CBL. CBL is a Delaware corporation in good standing with its principal place of business in Jeffersonville, Indiana.

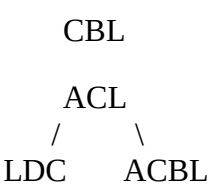
5. Prior to January 11, 2005, Danielson Holding Company was the parent corporation of ACLH, ACL, Louisiana Dock, and ACBL. It reorganized in bankruptcy. From January 11, 2005 on, American Commercial Lines, Inc., was the parent corporation of ACL, CBL, Louisiana Dock, and ACBL.[3]

6. The relationship of the relevant companies may be graphically represented thus:

Prior to January 11, 2005:



After January 11, 2005:



7. Neither ACBL nor CBL is registered to do business for any purpose in Missouri. Neither has any property, offices or employees located within Missouri.

[2] Louisiana Dock is now known as ACL Transportation Service, LLC, but we use its name at the time of the transactions in this decision.

[3] There are other companies in the ownership chain that are not relevant to this case.

8. Louisiana Dock is registered to do business in Missouri. It has property and approximately six employees in St. Louis, Missouri.

9. ACBL, Louisiana Dock, and ACL are disregarded entities for federal tax purposes pursuant to § 7701 of the Internal Revenue Code.[4] Their federal taxable income is included in the federal taxable income of, and reported by, CBL.

10. In 1998, Judy Hupp, Director of Tax,[5] registered Louisiana Dock for consumer's use tax in Missouri by submitting Form 2643, the Missouri Tax Registration Application. Her accompanying letter dated November 20, 1998, states:

> We would like to establish a state use account [sic] for the new entity, Louisiana Dock Company LLC, which is organized under the laws of Delaware. We currently file sales and use tax for the company under the name American Commercial Marine Service Company using tax identification number [xxxxxxx.]
>
> The new entity is a single member limited liability company. Under Internal Revenue Code Section 7701, single member limited liability companies are treated as disregarded entities. Disregarded entities do not file federal tax returns, instead, all returns are filed by the top level, multiple member limited liability company, American Commercial Lines Holdings LLC. A federal employer identification number has been issued to Louisiana Dock Company LLC and is included in the accompanying sales and use tax applications.
>
> For payroll tax purposes these companies have registered as American Commercial Lines Holdings LLC since Missouri follows federal statutes. However, for sales and use tax purposes we would like to register and pay as the single member company Louisiana Dock Company LLC. This will allow exemption certificates to bear the name Louisiana Dock Company LLC causing less confusion for our vendors.

Pet. Ex. 78 (pages unnumbered).

[4]The term "disregarded entity" is not actually used in § 7701, but is used in the implementing regulations thereunder at 26 C.F.R. § 301.7701-3.

[5] The record does not reveal for which companies Hupp was the Director of Tax, but we presume it was for at least ACBL and Louisiana Dock.

11. In 2007, Louisiana Dock changed its registration to reflect a change in the name of the owner of the business from ACL Transportation Services LLC to Commercial Barge Line Company. Once again, it submitted a Form 2643, in which it applied for both retail sales tax and consumer's use tax registration.

Sales Tax Transactions during the Audit Period

12. Louisiana Dock made certain purchases of various goods or supplies[6] under a claim of resale to ACBL. Claiming that they were purchased for resale, Louisiana Dock paid no sales tax on its purchases of the goods or supplies.

13. ACBL then purchased these goods and supplies from Louisiana Dock for its own use. ACBL provided Louisiana Dock with executed exemption certificates claiming that "Delivers [sic] were not made in the State of Missouri and the purchases were not used in the State of Missouri." Resp. Ex. A (audit package) at DD-6.

14. The Director's auditor considered these to be "in-commerce" exemption certificates, and asserted that ACBL provided them in bad faith. Accordingly, the Director assessed sales tax, additions to tax and interest against CBL and ACBL for the purchases originally made by Louisiana Dock.

Use Tax Transactions

15. ACBL purchased various food items, non-food supplies, and other items of tangible personal property such as cleaning products, cooking implements, paper products, and insecticides from The Henry A. Petter Supply Company ("Petter"), a vendor located in Paducah, Kentucky, for use on ACBL's towboats.

[6] We use the terms goods, supplies, and tangible personal property interchangeably in this decision, as the parties did in their written arguments.

16. ACBL placed its orders for the supplies with Petter. Some orders were placed from its Indiana facilities, and some were placed from the boats themselves.[7] ACBL provided Petter with an executed exemption certificate claiming that "Title does not pass to ACBL until the supplies have been delivered to the towboat which is always outside the State of Missouri." *Id.* at DD-2. The Director's auditor considered this as an "in-commerce" exemption certificate, and rejected it as provided in bad faith.

17. Petter packaged the ordered supplies on shrink-wrapped pallets and delivered them by common carrier from its facilities in Kentucky or Illinois to Louisiana Dock in St. Louis. Petter could not physically make the deliveries of the supplies to ACBL's towboats because ABCL's towboats do not dock anywhere on the Missouri shore.

18. Louisiana Dock stored the supplies at its facility in St. Louis for up to four or five days until ACBL's towboat to which the supplies were to be delivered entered the St. Louis harbor.[8]

19. Louisiana Dock delivered the supplies to ACBL's towboats midstream between Illinois and Missouri on the Mississippi River via Louisiana Dock's towboat while performing other services, such as picking up or delivering barges to ACBL's towboats. ACBL paid Louisiana Dock an hourly rate for all the services Louisiana Dock provided to ACBL, including the delivery of supplies, but there was no separate charge for the deliveries.

20. Lewis and Clark Marine, a company not affiliated with ACBL, sometimes picked up supplies from Louisiana Dock and delivered them to the ACBL towboat when the Louisiana

[7] At the hearing, Hupp testified that most orders were placed from the boats. However, in an affidavit she submitted with the Petitioners' motion for summary decision, she stated that the orders were placed from the Indiana facilities. Huff affidavit, ex. to Petitioners' Motion for Summary decision, ¶ 22. We conclude that orders were made from both places. We are allowed to take notice of our previous records in this case. *See In re Estate of Voegele*, 838 S.W.2d 444, 446 (Mo.App. E.D.1992); *Environmental Utilities, L.L.C. v. Public Serv. Comm'n of the State of Missouri*, 219 S.W.3d 256, 265 (Mo.App. W.D.2007). In addition, in their written arguments filed after hearing the parties have cited to evidence submitted with their motions for summary decision.

[8] The St. Louis harbor is the area that runs from mile 170 to mile 200 on the upper Mississippi River. Hupp depo. tr. at 12 (exhibit to Petitioners' motion for summary decision).

Dock boats were not available. On these occasions, Louisiana Dock paid Lewis and Clark an hourly rate for any work it performed, including the delivery of the supplies, but there was no separate charge for the deliveries.

21. ACBL purchased the remainder of the disputed goods or supplies from Economy Boat Store ("Economy"), a vendor in Wood River, Illinois. The vast majority of these purchases were of food.

22. On most occasions, Economy delivered the goods or supplies directly to ACBL's towboats in the northern part of the St. Louis harbor, using Economy's own boats.

23. Occasionally, Economy delivered the goods or supplies to Louisiana Dock in St. Louis. Louisiana Dock delivered the goods or supplies, unopened, to ACBL's tugboats.

24. Pursuant to its agreement with the Illinois Department of Revenue, Economy charged Illinois sales tax on the tangible personal property it delivered to northbound, but not southbound, boats in the St. Louis harbor.

25. Neither Economy nor Petter bore any further responsibility for goods damaged after they were delivered to Louisiana Dock. If goods were damaged while stored at its facility, responsibility lay with Louisiana Dock.

26. After delivery to the towboats by either outside vendors or Louisiana Dock, ACBL's towboat crews opened, inspected and accepted the goods or supplies on board the vessels in the midstream of the Mississippi River. If supplies were missing, broken, or defective, ACBL had the right to return such goods to the seller. If the shipment was complete and met expectations, the boat captain authorized the staff at ACBL's principal place of business in Jeffersonville, Indiana, to pay the vendor.

27. The crews used the goods or supplies on the towboats that continued on their interstate journeys on the Mississippi River and other inland waterways, except for the Missouri River.

28. No records indicate whether an ACBL towboat was on the east or the west side of the Mississippi River when it took delivery from Economy, Lewis and Clark Marine, or Louisiana Dock.

The Mississippi River

29. The Mississippi River is a major navigable waterway of the United States. All of the facilities on the Mississippi River, such as locks, are maintained by the United States government.

30. The boundaries of the State of Missouri were established by the Missouri Compromise in 1820. The pertinent part of the federal enabling legislation is set forth in § 7.001,[9] which provides that a portion of the Mississippi River lies within the state's boundaries:

> 7.001. Explanatory Note.--The boundaries of the state of Missouri have been fixed as follows:
>
> The enabling act of Congress (March 6, 1820), authorizing the admittance of Missouri into the Union, described the boundaries of Missouri as follows: (Section 2, Act of Admission, RSMo 1959, Volume 5)
>
> "Beginning in the middle of the Mississippi River, on the parallel of thirty-six degrees of north latitude; thence west, along that parallel of latitude, to the St. Francis River; thence up and following the course of that river, in the middle of the main channel thereof, to the parallel of latitude thirty-six degrees and thirty minutes; thence west along the same to a point where the said parallel is intersected by a meridian line passing through the middle of the mouth of the Kansas River, where the same empties into the Missouri River; thence from the point aforesaid, north, along the said meridian line, to the intersection of the parallel of latitude which passes through the rapids of the river Des Moines, making the said line to correspond with the Indian boundary line; thence east from the point of intersection last aforesaid, along the said parallel of latitude, to the middle of the channel of the main fork of the said river Des Moines; thence down and along the middle of the main channel of the said river Des Moines, to the

[9]Statutory references are to RSMo 2000 unless otherwise noted.

> mouth of the same, where it empties into the Mississippi River; thence due east to the middle of the main channel of the Mississippi River; thence down and following the course of the Mississippi River, in the middle of the main channel thereof, to the place of beginning."

Thus, where the Mississippi River runs along Missouri's border, the state boundary is "the middle of the main channel."

Audit and Assessments

31. The Director audited CBL, ACBL, Louisiana Dock and other companies affiliated with CBL in 2007-2008 for potential liability for sales, use and withholding taxes. The audit covered quarterly periods beginning October 1, 2001 and ending December 31, 2006. CBL and its affiliated companies fully cooperated with the Director in his audit.

32. As part of the audit, CBL executed waivers of the statutes of limitations for sales and use taxes on March 26, 2007. The waivers expired on March 26, 2008.

33. Neither ACBL nor CBL filed any sales or use tax returns for the applicable periods in which ACBL made purchases for which the Director made assessments. Louisiana Dock filed sales and use tax returns with the Director during the audit period.

34. At the conclusion of the audit, the auditor issued a letter dated September 15, 2008, setting forth ACBL's sales and use tax liability, and another letter on September 24, 2008, stating that CBL had no sales or use tax liability. The auditor was under the mistaken impression that the responsible taxpayer for the entire audit was ACBL rather than CBL.

35. On March 27, 2009, the Department issued assessments against ACBL and Louisiana Dock for sales and use tax liabilities. On July 20, 2010, the Department issued assessments for the same taxes and additions (with greater interest amounts) against CBL.

Sales Tax and Related Charges

33. ACBL appealed from the following final decisions of the Director of Revenue, each dated March 27, 2009, assessing Missouri state and local sales taxes, additions to tax and interest in the following amounts for each of the following periods:

Period Ended	Sales Tax	Additions	Interest	Total
12/31/03	$757.39	$37.87	$254.94	$1,050.20
3/31/04	800.24	40.01	261.51	1,101.76
6/30/04	794.75	39.74	251.73	1,086.22
9/30/04	778.04	38.90	238.58	1,055.52
12/31/04	317.00	15.85	93.75	426.60
3/31/05	619.84	30.99	175.76	826.59
6/30/05	762.40	38.12	206.57	1,007.09
9/30/05	846.11	42.31	218.61	1,107.03
12/31/05	903.30	45.17	220.45	1,168.92
3/31/06	843.96	42.20	191.55	1,077.71
6/30/06	1,274.54	63.73	266.83	1,605.10
9/30/06	1,112.06	55.60	213.17	1,380.83
Totals:	9,809.63	490.49	2,593.45	12,893.57

34. The Director issued final decisions making the same assessments against CBL, with greater accrued interest, on July 20, 2010. CBL timely appealed those final decisions of the Director.

Use Tax and Related Charges

35. ACBL also appealed from the following final decisions of the Director, each dated March 27, 2009, assessing against ACBL Missouri state and local use taxes, additions to tax and interest in the following amounts for each of the following periods:

Period Ended	Use Tax	Additions	Interest	Total
12/31/01	$3,908.48	$195.42	$1,738.87	$5,842.77
3/31/02	4,273.08	213.65	1,838.59	6,325.32
6/30/02	4,823.85	241.19	2,002.68	7,067.72
9/30/02	4,699.94	235.00	1,880.12	6,815.06
12/31/02	4,520.46	226.02	1,743.73	6,490.21
3/31/03	4,163.32	208.17	1,555.20	5,926.69

6/30/03	4,428.89	221.44	1,598.67	6,249.00
9/30/03	3,133.15	156.66	1,091.48	4,381.29
12/31/03	3,307.36	165.37	1,113.32	4,586.05
3/31/04	2,796.21	139.81	913.71	3,849.73
6/30/04	3,381.28	169.06	1,070.90	4,621.24
9/30/04	3,274.03	163.70	1,004.03	4,441.76
12/31/04	3,486.00	174.30	1,030.99	4,691.29
3/31/05	3,240.58	162.03	918.92	4,321.53
6/30/05	3,043.50	152.18	824.64	4,020.32
9/30/05	3,041.17	152.06	785.69	3,978.92
12/31/05	3,172.23	158.61	774.16	4,105.00
3/31/06	3,622.99	181.15	822.38	4,626.52
6/30/06	3,688.43	184.42	772.16	4,645.01
9/30/06	3,315.95	165.80	635.69	4,117.44
12/31/06	5,454.70	272.74	944.78	6,672.22
Totals:	78,775.60	3,938.78	25,060.71	107,775.09

36. The Director issued final decisions making the same assessments against CBL, with greater accrued interest, on July 20, 2010. CBL timely appealed those final decisions of the Director.

Conclusions of Law

We have jurisdiction over appeals of the Director's final decisions. Section 621.050.1. Our duty in a tax case is not merely to review the Director's decision, but to find facts and determine the taxpayer's lawful tax liability for the period or transaction at issue by applying existing law to those facts. *J.C. Nichols Co. v. Director of Revenue,* 796 S.W.2d 16, 20-21 (Mo. banc 1990). Exemptions from tax "are to be strictly construed against the taxpayer, and any doubt resolved in favor of application of the tax." *Southwestern Bell Telephone Co. v. Dir. of Revenue,* 182 S.W.3d 226, 228 (Mo. banc 2005). Exclusions from tax, however, are construed in favor of the taxpayer because all laws imposing a tax are strictly construed against the taxing authority in favor of the taxpayer. Section 136.300.1. Regardless of the canon of construction that applies, Petitioners have the burden to prove they are not liable for the Director's assessments. Section 621.050.2.

Petitioners are part of a large holding company with a complicated organizational structure. They have raised many arguments as to why they are not liable for the taxes assessed by the Director. In the end, however, the facts are fairly simple. Petitioners purchased routine supplies for use on their boats from vendors in Missouri, Kentucky and Illinois. Except for the goods purchased from Economy and delivered to their northbound boats, they paid no sales or use tax on those purchases to those states. The Director assessed sales and use tax on the purchases of the goods that were delivered to ACBL's boats when they were in Missouri. Petitioners believe they should pay no taxes *to any state* on these purchases.

Petitioners argue that the sales or transactions did not occur in Missouri because title to the goods did not pass until they were delivered, inspected, and accepted by the line haul boat crews midstream in the Mississippi River, and the Director considers such sales to be "export sales" not subject to sales or use tax. They claim that even if the Director no longer considers such sales to be export sales, he did so previously, so the change in policy is an "unexpected decision" and should be applied only prospectively. They contend that even if title to the goods passed in Missouri, the goods did not finally come to rest there, so no use tax should apply. They also argue that if the sales did occur in Missouri, the Director should have assessed sales tax, not use tax, on the Petter and Economy transactions.

If these arguments fail, Petitioners claim that even if the transactions are otherwise subject to sales and use tax, the Commerce Clause of the United States Constitution precludes the imposition and collection of the taxes on goods purchased from out-of-state vendors, because Petitioners had no substantial nexus with Missouri and because the taxes are not fairly related to any services provided by Missouri to the line haul boats operating in the Mississippi River. They claim that 33 U.S.C.§ 5(b), enacted as part of the Maritime Transportation Security Act of 2002 ("the Maritime Security Act") prohibits the imposition or collection of any tax from any vessel

by any non-federal interest, if the vessel is operating on any waters subject to the authority of the United States. Finally, they claim that the statutes of limitations found in §§ 144.220.1 and 144.720 bar the assessments.

In the 2012 order, we addressed each of these issues. Petitioners argue that because we denied both parties' motions for summary decision in that order, our findings and conclusions therein were interlocutory and we should revisit them. As the parties have supplied additional facts and argument since the 2012 order was issued, we will do so. However, we note that the following conclusions of law incorporate large portions of the 2012 order.

I. Did any of these transactions take place in Missouri?

A threshold question in this case is whether any sales took place in Missouri. Petitioners contend that, for tax purposes, they did not. They make a series of interlocking arguments that must be addressed in concert. First, they argue that the supplies delivered to Louisiana Dock for further delivery to the ACBL towboats were not sold, used or consumed in Missouri. Title passed when the ACBL crew inspected and accepted the supplies on the Mississippi River. Then, they argue, based on a finding of fact in a 1987 decision of this Commission, that the Director considers that "the mid-stream of the Mississippi River is outside the state for tax purposes;" thus, "the goods were not to be used in the state because the line haul towboats never docked here." Pet Brief at 14. Furthermore, they contend, even if the goods were delivered in Missouri, it is impossible to show whether they were "used" in Missouri, or in another state. Finally, they argue that if the sales took place in Missouri, they are subject to sales tax, not use tax, and under *Dyno Nobel, Inc. v. Director of Revenue,* 75 S.W.3d 240 (Mo. banc 2002), the assessments cannot stand.

To untangle these arguments, we must first consider the nature of the transactions at issue in this case, then where the transactions took place. But first, it is useful to review the basic rules regarding the incidence of sales and use tax, as set forth in 12 CSR 10-113.200(1).

> In general, a sale of tangible personal property is subject to sales tax if title to or ownership of the property transfers in Missouri unless the transaction is in commerce. The seller must collect and remit the sales tax. If a sale is not subject to Missouri sales tax but the property is stored, used or consumed in Missouri, the transaction is subject to use tax. If the transaction is subject to use tax and the seller has nexus with Missouri, the seller must collect the tax at the time of the sale and remit it to the department. If the seller does not collect the tax, the buyer must pay use tax directly to the department. If a sale of tangible personal property is not subject to Missouri sales tax and the property is not stored, used or consumed in this state, no Missouri tax is due.

Thus, whether a sale is subject to sales tax, use tax, or no tax depends on where title transfers, whether the seller has nexus with Missouri, and, with respect to use tax, where the property is used, stored or consumed. We examine these factors with respect to the different types of transactions at issue in this case.

A. Where Did the Transactions Take Place?

1. Sales from Louisiana Dock to ACBL

Louisiana Dock, a Missouri vendor, sold tangible personal property to ACBL and delivered it to ACBL's boats on the river. Under 12 CSR 10-113.200(3)(A), "Title transfers when the seller completes its obligations regarding physical delivery of the property, unless the seller and buyer expressly agree that title transfers at a different time." As there is no evidence to the contrary, we determine that title to the goods passed on the river. Under § 7.001, portions of the river lie in Missouri. If the boat was on the Missouri side of the river when the sale took place, it was a Missouri sale subject to sales tax.

Ordinarily in such a case the responsibility for the sales tax would fall on Louisiana Dock, the seller. But ACBL furnished Louisiana Dock with an exemption certificate claiming that the deliveries were not made and the goods were not used in Missouri. The Director deemed this to be an "in commerce" exemption claim. In his audit, he rejected the exemption as made in bad faith. Under § 144.210, "when a purchaser has purchased tangible personal property or services sales tax free under a claim of exemption which is found to be improper, the director of revenue may collect the proper amount of tax, interest, additions to tax and penalty from the purchaser directly."

"[A] transaction is 'in commerce' if the order is approved outside Missouri and the tangible personal property is shipped from outside Missouri directly to the buyer in Missouri." Regulation 12 CSR 10-113.200(2)(B). The "and" in the sentence indicates that both elements must be present. These goods were shipped from a seller in Missouri, so the "in commerce" exception does not apply. Thus, if the title to the goods passed in Missouri, ACBL is liable to pay the sales tax on them under § 144.210.

2. Sales from Petter (and occasionally Economy) to ACBL, delivered to Louisiana Dock, for further delivery to ACBL's boats on the river.

With respect to these transactions, there are two obvious possibilities as to where title passed, and the parties fiercely argue their respective positions. The Director argues that title passed at Louisiana Dock, a site unquestionably in Missouri, because the evidence indicates that the sellers completed their obligations regarding physical delivery at Louisiana Dock, and that risk of loss shifted to Louisiana Dock from the sellers at that point. In addition to the presumption under 12 CSR 10-113.200(3)(A) that title passes when the seller completes its delivery obligations unless the parties expressly agree to the contrary, application of § 347.187.2 could also support the Director's contention. It provides:

> Solely for the purposes of chapter 143, RSMo, chapter 144, RSMo, and chapter 288, RSMo, a limited liability company and its members shall be classified and treated on a basis consistent with the limited liability company's classification for federal income tax purposes.

ACBL and Louisiana Dock are disregarded entities for federal income tax purposes. Thus, because of the identity for tax purposes of ACBL, Louisiana Dock, and CBL, one could argue that title transferred to the Petitioners when the goods were delivered to Louisiana Dock.

Petitioners argue, however, that the goods were only temporarily stored at Louisiana Dock. Section 144.605(10) excepts from the use tax property "that is temporarily kept or retained for subsequent use outside the state." They argue that the evidence establishes that ACBL had an understanding with both Petter and Economy that title and ownership of the goods did not pass to ACBL until they were delivered to and inspected on the boats.

Passage of title is an important consideration for determining whether use tax applies, and in some cases it may be the dispositive taxable event. "In sales and use tax, the taxable event is the passage of title or ownership." *Blevins Asphalt Const. Co. v. Dir. of Revenue,* 938 S.W.2d 899, 901 (Mo. banc 1997), *quoted in E & B Granite, Inc. v. Director of Revenue,* 331 S.W.3d 314, 316 (Mo. banc 2011). For purposes of determining whether use tax applies to the purchases at issue here, however, it is a distraction. That is because while § 144.610 imposes the use tax for the privilege of storing, using or consuming within this state any article of tangible personal property:

> **This tax does not apply** with respect to the storage, use or consumption of any article of tangible personal property purchased, produced or manufactured outside this state **until the transportation of the article has finally come to rest within this state** or until the article has become commingled with the general mass of property of this state.

(Emphasis added).

Thus, even if title to the goods passed at Louisiana Dock, use tax does not apply until goods "finally come to rest." The evidence is clear in this case that the goods did not finally come to rest at Louisiana Dock – they were destined for Petitioners' boats. This makes it unnecessary to address Petitioners' argument that use tax did not attach to the goods when they were delivered to Louisiana Dock because the goods were only stored there temporarily.

3. Sales from Economy to ACBL, delivered to boats on the river.

Most sales from Economy, an Illinois vendor, to ACBL were completed at ACBL's boats. Because the State of Illinois assessed sales tax on the transactions that took place when the boats were northbound on the river, the Director assessed use tax only on the transactions that took place when the boats were southbound. "In general, when a taxpayer purchases tangible personal property from outside the state for use, storage or consumption in this state the taxpayer must pay use tax. " 12 CSR 10-103.250. There is no question with these transactions that title to the goods passed on the boats as they were southbound on the river. But since use tax would apply here rather than sales tax, once again we must determine not only whether the boats were in Missouri when the transactions occurred, but also whether this is where the goods finally came to rest. Section 144.610.

B. Were the boats in Missouri when the taxable events took place?

We have determined that the taxable events in this case – either the passage of title or the goods and supplies finally coming to rest – took place on ACBL's boats while on the Mississippi river. But we must further determine whether the boats were in Missouri when the transactions took place. The boundaries of the state of Missouri extend to the "middle of the main channel of the Mississippi River." If a Missouri seller makes a sale at retail within that area, such a sale is

subject to sales tax. If goods purchased from an out-of-state seller finally come to rest within that area, they are subject to use tax in Missouri.[10]

Petitioners argue that *Patton-Tully Transportation Co. v. Director of Revenue,* No. RS-85-1594 (Mo. Admin. Hrg. Comm'n Nov. 25, 1987) dictates a different result. Based on that decision, they contend that the Director views a midstream delivery as "outside the state for tax purposes." The following finding of fact appears in *Patton-Tully*:

> 14. The Missouri Department of Revenue views a sale of tangible personal property as an export sale and not subject to the Missouri sales tax if the tangible personal property is delivered by the Missouri vendor to the purchaser's barge or carrier in "mid-stream," or if the tangible personal property is delivered by the Missouri vendor, by any means, to the purchaser's location outside Missouri and is not actually delivered to the purchaser at some location in Missouri.

Id. at 5-6.

The taxpayer in *Patton-Tully* was a barge company that transported stone from Missouri quarries to out-of-state construction sites. The taxpayer loaded the stone on barges in Missouri and transported it to construction sites outside Missouri. Its customer, the Army Corps of Engineers, would inspect the stone at the construction site. If it passed inspection, the taxpayer notified the Missouri quarry, which would invoice the taxpayer. The parties intended that title to the stone would pass to the taxpayer at the out-of-state construction site. The taxpayer did not pay Missouri sales tax on the transactions. This additional finding of fact appears in the decision:

> 13. Based on Petitioner's belief that the above-described transactions were sales in interstate commerce, Petitioner purchased the stone from its suppliers using export sales

[10]The Director also argues, based on *Streckfus Steamers, Inc. v. City of St. Louis***,** 472 S.W.2d 660 (St. Louis Ct. App. 1971), that all of the Mississippi River running through Missouri is within the state of Missouri because the Act of Congress authorizing the state, 3 U.S. Stat 545, gives Missouri concurrent jurisdiction on the river, and thus sovereignty anywhere on the river. In light of § 7.001, we do not take this as sufficient evidence that, for tax purposes, Missouri's boundaries extend to the shores of Illinois.

> exemption certificates, **paid applicable use taxes in the states where the construction work occurred,** and did not pay Missouri sales tax on these transactions.

Id. at 5 (emphases added).

We first observe that nothing in *Patton-Tulley* actually says the Director viewed a midstream delivery as one taking place out of state. The finding of fact Petitioners cite states that the Director viewed such a delivery as an export sale, and the facts in this case are distinguishable from those of *Patton-Tully*. Although Petitioners argue that the facts in the two cases are "nearly identical," there are three significant differences. First, in *Patton-Tully*, the parties intended that title to the tangible personal property would pass at out-of-state construction sites. Title to the goods at issue here passed either at Louisiana Dock or on the Mississippi River, portions of which lie within the state of Missouri. Second, the stone in *Patton-Tully* was expressly destined for use out of state. That is not true for the goods at issue here. Third, in *Patton-Tully*, the taxpayer acknowledged that the stone was subject to taxation – just not in Missouri, as the Commission found that the taxpayer paid use tax on the stone in the other states where it was used. Here, the taxpayer contends that the tangible personal property it purchased is *never* subject to taxation, in any state.

These distinctions are substantial. *Patton-Tully* does not compel a determination that the sales of goods here that occurred on the Mississippi River did not take place in Missouri, or that they were necessarily exempt from sales tax as export sales.

There is no evidence in the record whether the goods were delivered to ACBL's boats when they were in Missouri or Illinois. It is likely that deliveries were made in both states. In the 2012 order, we acknowledged the difficulty of establishing these facts. We noted a similar case from the state of Illinois, *Sinclair Refining Company v. Department of Revenue*, 277 N.E.2d 858 (Il. Sup. 1971). *Sinclair* analyzed a similar problem: whether Illinois' imposition of sales

taxes on midstream deliveries of fuel oil to boats on the Mississippi River violated the Commerce Clause. The court first determined that, under Illinois law, title to the fuel oil occurred when it was delivered to the towboats.

> Thus, where delivery of the fuel oil was on the Missouri side of the main channel of the Mississippi River, the sale was in Missouri; where the delivery was on the Illinois side of the main channel, the sale was in Illinois.
>
> As to the tax measured by the sale of fuel oil in Illinois, we hold that it does not contravene the commerce clause of the Federal constitution.
>
> * * *
>
> As to the tax measured by the sale of fuel oil in Missouri, we hold it does violate the commerce clause of the Federal constitution [citation omitted].
>
> As above stated, the problem in this case is that of determining in which State the sale of fuel oil occurred.

Id. at 860-61.

The court in *Sinclair* was presented with arguments that the uncertainty with respect to whether the sales at issue occurred in Missouri or Illinois meant that all, or none, of the sales were taxable. But it rejected both such arguments:

> As we have indicated, it is impossible to determine with any degree of certainty the amount of fuel oil that was sold in Illinois or the amount that was sold in Missouri. This uncertainty was not caused by any action or inaction of plaintiff or its marketer but is the result of a moving delivery in an area where the State boundary cannot be readily identified with certainty. To hold that plaintiff must prove the amount sold in Missouri before it can claim any exemption would be to deny it all exemption, and yet it is certain that a part of the sales were exempt.
>
> * * *
>
> This case is not one for the imposition of 'Draconion Absolutes', . . . and although the result may to some extent be speculative, the Department of Revenue . . . can make a determination of the

> factual issue presented, and the case should be remanded for that purpose.

277 N.E.2d at 862. Thus, in the 2012 order, we invited the parties to present additional evidence on the issue at hearing.

> Unfortunately, the record simply does not contain enough facts to allow us to determine which, if any, of these taxable events took place in Missouri. The evidence establishes that Petitioners' boats cruise up and down the Mississippi, on both sides of the channel. Sometimes they are on the Missouri side, and sometimes they are not. If they take delivery of goods on the Missouri side, the transaction is subject to Missouri sales or use tax. If they do not, the transaction is not subject to Missouri sales or use tax. **But we have no evidence which of the sales for which the Director assessed sales or use tax took place in Missouri, and we likewise have no method to apportion the percentage of such sales . . . we are confident that a method to apportion the sales between Missouri and Illinois can be derived.**

2012 order at 24-26 (footnote omitted).

Despite this invitation, the parties presented no additional evidence on this point. Petitioners merely state in their brief that the suggestion in *Sinclair* "that the location of delivery can be determined with certainty is, with all due respect, impractical." *Pet. Opening Brief* at 15. That is, of course, not what the *Sinclair* court said. It suggested not that the location of delivery be identified with "certainty," but that some determination could be made. The result here is that we have no suggestions from the parties as to the location or the sales, or how to apportion them.

In such a case, the courts have directed that we must make the best determination we can given the facts in the record before us.

> [T]he statutes commit the determination of factual issues to the AHC's discretion. *Kansas City Power & Light Co. v. Director of Revenue,* 783 S.W.2d 910, 912 (Mo. banc 1990). Under *Dick Proctor Imports v. Director of Revenue,* 746 S.W.2d 571 (Mo. banc 1988), where evidence is not sufficient to allow for a precise calculation of the amount of tax, then "the Commission shall make as close an approximation as it can. Doubt may be resolved against

> [the taxpayer] at whose door the uncertainty can be laid." *Id.* at 575.

Kansas City Power and Light Co. v. Director of Revenue, 83 S.W.3d 548, 553 (Mo. banc 2002).

Accordingly, we determine that the goods delivered by Economy to ACBL's boats were delivered in Missouri. This is a relatively easy determination because Illinois apparently made a reciprocal determination when it decided to collect sales tax from Economy on its sales to ACBL's northbound boats. Here, the Director assessed use tax only on deliveries of goods to ACBL's southbound boats. This is a reasonable proxy for the determination that the boats were on the Missouri side of the river when the deliveries were made.

Pinpointing the delivery location of the goods delivered by Louisiana Dock – whether the seller was Louisiana Dock, Petter, or Economy – is more problematic. In those cases, we not only do not know whether the boats were on the east side of the river or the west when the goods were delivered, but whether they were north- or south bound. We have combed the record for such evidence, but it simply is not there. We discuss this issue at further length in Section VI, "Petitioners' Liability." For now, it suffices to say that we determine that the boats were on the Missouri side of the river when title to some of the goods passed, and when some of the goods finally came to rest.

C. Did the goods finally come to rest when they were delivered to the boats?

Petitioners argue, with respect to the purchases from Economy and Petter, that even if the transactions took place in Missouri, the goods did not finally come to rest in Missouri. Even as to goods delivered to boats within Missouri's borders, Petitioners argue, they cannot be subject to Missouri's use tax because it cannot be shown that the supplies would be used or consumed in Missouri. Food delivered in Missouri, for example, might be prepared and consumed far upstream in Minnesota's portion of the Mississippi river. Once again, however, the dispositive

issue is where the goods "finally came to rest." If the goods finally came to rest in Missouri and were used, stored, or consumed there, they are subject to use tax.

Petitioners are actually making two arguments here. The first is that the goods do not "finally come to rest" in Missouri. The second is that they are not "used" in Missouri. The concepts are related, but not identical.

In *Fall Creek Construction Co., Inc. v. Director of Revenue* 109 S.W.3d 165 (Mo. banc 2003), a construction company argued that its fractional ownership share of two aircraft was not subject to use tax because the aircraft were transient by nature and never came to rest in any location. The court considered the meaning of the phrase "finally comes to rest" at some length:

> The phrase "finally comes to rest" must necessarily be considered in relation to the object to which it applies. Were this Court to adopt Fall Creek's strict construction of the statute, no aircraft, motor vehicle or other transitory object could ever finally come to rest in Missouri until it "finally" entered the junkyard or scrap heap, for until then such objects always have the capability of leaving the state. The term "finally" cannot have such an exclusive meaning in this context. **Rather, "finally" merely indicates that the property is "finally" in Missouri ready for use. In this context, the term "finally" need not mean that the property must remain here forever or be "domiciled" here, especially transitory property like airplanes whose use may require that they fly in and out of the state**. Just as "[v]egetables do not have to 'come to rot' in order to [finally] 'come to rest,' aircraft need not be interred in an airplane graveyard to satisfy the statute.

Id. at 173 (emphasis added; internal citations omitted). The tangible personal property at issue in this case "finally comes to rest" when it is delivered to ACBL's towboats. It may subsequently be used or consumed outside the state, but it is "finally in Missouri ready for use" if it is delivered to ACBL's towboat when it is in Missouri.

The property is also "used," in Missouri, as that term is defined by Missouri law. It is certainly possible, as Petitioners argue, that some of the property delivered to ACBL's boats will be subjected to *further use* when the boats have traveled outside of Missouri. To use Petitioners'

example, canned food could be delivered to a boat in Missouri's waters, but not opened and prepared for consumption until the boat has traveled to Minnesota. But that is not what the word "use" means for purposes of § 144.610.

Section 144.605(13) defines use as:

> **the exercise of any right or power over tangible personal property incident to the ownership or control of that property,** except that it does not include the temporary storage of property in this state for subsequent use outside the state, or the sale of the property in the regular course of business[.]

(Emphasis added).

In *R&M Enterprises, Inc. v. Director of Revenue*, 748 S.W.2d 171 (Mo. banc 1988), overruled *on other grounds by House of Lloyd, Inc. v. Dir. of Revenue*, 884 S.W.2d 271 (Mo. banc 1994), the court applied use tax to books that were bound outside of Missouri but stored briefly in the state before being shipped to retailers within and without the state of Missouri. The court stated:

> [A]ppellant . . . has complete dominion and control over [the books]. They come to rest in Missouri . . . [Appellant] has the privilege of "using," in the sense of the statute. It makes no difference that it may assert this privilege only a very brief time. The privilege of using is the occasion for taxation.

Id. at 172.

Although Petitioners do not expressly make this argument, implicitly they are arguing that some of the goods were not "used," but "stored" on the boats while in Missouri, for "use" outside the state. Section 144.610 imposes the use tax on the privilege of storing tangible personal property within this state, but § 144.605(10) defines "storage" as:

> any keeping or retention in this state of tangible personal property purchased from a vendor, **except property for sale or property that is temporarily kept or retained in this state for subsequent use outside the state**[.]

(Emphasis added).

The court in *U.S. Sprint Communications v. Director of Revenue*, 834 S.W.2d 803 (Mo. App. W.D., 1992), addressed the concept of temporary storage for subsequent use outside the state. It held that property Sprint purchased from out-of-state vendors, delivered to Missouri, and subsequently used out of state, was subject to use tax because:

> The property was not segregated from other property of like kind, either at the time of purchase, or at the time of receipt in the warehouse, or at any time until the time came to withdraw it from the mass and send it to an outstate destination. **It cannot be said of any particular item of property at the time of its purchase that it was purchased for the purpose of subsequent use solely outside the state. One could only say of a particular item of property that it might be used outside the state, or it might be used within the state. Of the mass of property, it may only be said at the time of its purchase that some undetermined and undivided part of it would be later used outside the state. How much of the property, if any at all, would be withdrawn from the mass for use outside the state; which particular items of property; and when the withdrawal should be made, all were within Sprint's control.** This scheme we believe does not bring any part of the property within the definition of property "purchased . . . for (the purpose of) subsequent use solely outside the state." In order to come within this definition, the purpose must exist with respect to particular property at the time of its purchase to use the property solely outside the State.

Id. at 804-05 (Emphasis added).

Petitioners note that § 144.610 was amended after the *Sprint* decision to delete the requirement that the tangible personal property be purchased for subsequent use *solely* outside the state. They argue that, after the amendment:

> [A] taxpayer need not show that *all* of the property is going to be used outside the state – a logistical hurdle that in many cases would be impossible to overcome. The boats here, for example, travel all over the inland waterways. The goods may be used anywhere on their trips, not just when opposite Missouri shores. It would be a nightmare to have to account for the exact location that certain food was used. Is it when it was cooked or when it was eaten? And is a light bulb "used" for use tax purposes if it

> installed [sic] while at St. Paul, Minnesota, but still working when the boat arrives in St. Louis?

Pet. Opening Brief at 15.

The Director's regulations contemplate that taxpayers may be able to prove that some tangible personal property will be used in state, and some will be temporarily stored for use out of state. If they can prove this, the latter will not be subject to use tax. 12 CSR 10-113.300 provides:

> (1) In general, the temporary storage of property in this state with the intent to subsequently use the property outside the state is not subject to use tax.
>
> (2) Definition of terms.
>
> > (A) Storage – Any keeping or retention in this state of tangible personal property purchased from an out-of-state vendor, except property for sale or property that is temporarily kept or retained in this state for subsequent use outside the state. **To be "for subsequent use outside the state" the purchaser must intend at the time the property is delivered to a Missouri location to subsequently use the property outside the state**.

(Emphasis added).

Petitioners have made no differentiation among the goods delivered to them in Missouri, as to which were intended for use within the state and which were intended for use outside the state. Furthermore, this is not a case like *Sprint* or *R&M Industries,* in which it is clear that inventory was held within the state to be used for business purposes outside the state. The goods here are consumable goods like food, lightbulbs, and paper towels, which could be used immediately by the staff on Petitioners' boats. Petitioners' staff has complete dominion and control over the goods when they are delivered. If that delivery occurs in Missouri, the goods are "finally in Missouri ready for use," and they are "used" in Missouri. It is worth noting here

that the Director does not seek to tax the goods that finally came to rest in another state and were subsequently subjected to further use in Missouri, like lightbulbs installed in Minnesota and still functioning in the St. Louis Harbor, to use Petitioners' example. He seeks to tax only the goods that finally came to rest in Missouri.

D. Sales vs. Use Tax

Petitioners further argue that if title to these goods passed in Missouri, the use tax assessments should be set aside because the transactions were sales at retail, subject to sales tax under § 144.020.1, RSMo Supp. 2012. Under *Dyno Nobel,* a use tax assessment on a transaction that was properly subject to sales tax is invalid as to that transaction.[11]

Section 144.010.1(11), RSMo Supp. 2012, defines a sale at retail as "any transfer made by any person engaged in business as defined herein of the ownership or, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration[.]" But, § 144.030.1, RSMo Supp. 2012 exempts from "the provisions of sections 144.010 to 144.525 and from the computation of the tax levied, assessed or payable pursuant to sections 144.010 to 144.525 such retail sales as may be made in commerce between this state and any other state of the United States[.]" In other words, sales from a vendor in one state to a purchaser in this state are exempt from sales tax – but they are not exempt from use tax, which is imposed by § 144.610. And if the vendor lacks nexus with Missouri, it is the purchaser's responsibility to pay the use tax.

[11] Although it is unnecessary for us to resolve this point, even if these transactions were properly subject to sales rather than use tax, *Dyno Nobel* is distinguishable from this case on other grounds. In *Dyno Nobel,* the Director argued that the use taxes paid by the company should not be refunded to the company, but should be credited toward its unpaid sales tax. The Court rejected this argument not only because the Director had not made a sales tax assessment against Dyno Nobel, but also because the ultimate responsibility for remitting sales tax lies with the seller rather than the purchaser, which was Dyno Nobel. The improper exemption certificate ACBL furnished to Petter distinguishes this case from that situation.

As previously discussed, the Director's regulations clarify this scheme. Regulation 12 CSR 10-113.200 provides:

> (1) In general, a sale of tangible personal property is subject to sales tax if title to or ownership of the property transfers in Missouri unless the transaction is in commerce. The seller must collect and remit the sales tax. If a sale is not subject to Missouri sales tax but the property is stored, used or consumed in Missouri, the transaction is subject to use tax[.]

And 12 CSR 10-103.250 provides:

> (1) In general, when a taxpayer purchases tangible personal property from outside the state for use, storage or consumption in this state the taxpayer must pay use tax. Any Missouri tax due is reduced by any sales or use tax properly paid to another state.
>
> (2) Basic Application of Tax.
>
> > (A) Generally, if a taxpayer does not pay use tax to a seller on out-of-state purchases of tangible personal property for use, storage or consumption in this state, the taxpayer must file a use tax return and remit the tax.

Petitioners point to another part of 12 CSR 10-113.200 that states:

> (3) Basic Application of Taxes.
>
> * * *
>
> > (C) When an out-of-state seller delivers tangible personal property to a third-party common or contract carrier for delivery to Missouri, title transfers in Missouri. If delivery is made to seller or an agent of seller (other than a third-party common or contract carrier) in Missouri and subsequently delivered to the buyer in Missouri, the sale is subject to Missouri sales tax**. If delivery is made directly from the out-of-state seller to the buyer in Missouri, the sale is subject to sales tax if the order was approved in Missouri. If the order was approved outside Missouri, the sale is not subject to sales tax, but the transaction is subject to use tax unless otherwise exempt.**

(Emphasis added). They point out, with justification, that the regulation does not identify the party who must "approve" the order. They argue that ACBL does not incur an obligation to pay

for the goods until they are inspected and accepted by staff on the boat, so the "approval" for the sale occurs on the river. If that is in Missouri, they reason, the sale is a sale at retail in Missouri, and may be subject to sales tax, but not use tax.

Section 144.030 does not use the word "approve." Regulation 12 CSR 10-113.200 uses the word several times, but does not define it. Further inspection of the regulation as a whole, however, indicates that it refers to the seller's acceptance of the purchaser's order, as in these examples:

> (4)(B) A customer purchases custom fabricated goods from a Missouri seller. The order for the goods must be approved at the seller's out-of-state headquarters. The goods will be shipped by the seller directly from the out-of-state facility to the customer's Missouri location. The sale is subject to use tax because the order was approved out-of-state and the goods were shipped from out-of-state directly to the customer in Missouri.
>
> (4)(C) A Missouri seller sells pens, calendars, cups and similar items with the customer's logo printed on them. The seller sends the orders to an out-of-state supplier to custom print the items that are drop shipped directly to the customer in Missouri. The sale is subject to sales tax because the customer's order taken by the seller is approved in Missouri.

Furthermore, this interpretation also accords with the purpose of the use tax:

> This tax is a levy on the privilege of using within this state property purchased outside Missouri, where the property would have been subject to the sales tax if purchased locally. *Dir. of Revenue v. Superior Aircraft Leasing Co.,* 734 S.W.2d 504, 505 (Mo. banc 1987). Its purpose is to "complement, supplement, and protect the sales tax." *Id.* at 506 (quotation omitted). This tax "eliminates the incentive to purchase from out-of-state merchants in order to escape local sales taxes thereby keeping in-state merchants competitive with sellers in other states, and it also provides a means to augment state revenues." *Id.* (quotation omitted).

Fall Creek, 109 S.W.3d at 169. Under Petitioners' interpretation, purchases in Missouri of goods sold by out-of-state vendors lacking nexus with Missouri would escape taxation completely. That is not the taxation scheme that has been enacted by the General Assembly.

II. The Commerce Clause

Even if the transactions are otherwise subject to sales or use tax, Petitioners argue that the Commerce Clause bars their taxation. To sustain a sales or use tax on transactions involving vessels operating in interstate commerce, the tax must meet the four criteria outlined in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). *President Riverboat Casino-Missouri, Inc. v. Missouri Gaming Com'n,* 13 S.W.3d 635, 638 -639 (Mo. banc 2000). It must (1) have a substantial nexus with the state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state. *Complete Auto Transit* at 279.

Petitioners originally claimed that the transactions on which the Director assessed sales and use tax fail to meet two of the above criteria in that they lack a substantial nexus with Missouri, and Missouri provides no services to their towboats. In our 2012 order, we found both prongs were satisfied. Petitioners now focus almost entirely on the "services" prong of the *Complete Auto Transit* case. It is unclear whether they have abandoned the nexus argument, but our conclusion that sales on the Mississippi River within Missouri's borders are sales in Missouri is dispositive. "It has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." *Oklahoma Tax Com'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995).

Fairly Related to Services

In support of their position that the taxes here are not fairly related to services provided to them by Missouri, Petitioners rely on *American River Transportation Co. v. Bower,* 813 N.E.2d 1090 (Il. App. 2004) ("*ARTCO*"), a case they characterize as "on all fours" and "identical" to their situation.

ARTCO concerned a tugboat operator that challenged Illinois' use tax on diesel fuel and other supplies. The fuel and supplies at issue were purchased and loaded onto large tugboats called line haul vessels at ARTCO's facilities in St. Louis. The tugboats spent at least 50% of their time pushing barges in Illinois waters, but they never docked in any Illinois port. Smaller tugboats, called harbor service tugs, moved barges between the line haul vessels and the Illinois ports. The harbor service tugs purchased fuel in Illinois and paid use tax on those purchases.

The Illinois court concluded that three of the four *Complete Auto Transit* criteria were met in this case, and that the boats had a sufficient physical presence in Illinois to establish a substantial nexus. But it concluded that Illinois provided no services to the tugboats. The waters, while in Illinois, were navigable waterways of the United States and were maintained by the United States. The Illinois Department of Revenue argued that Illinois law provided ARTCO's tugboats with protection from polluted waterways and protection of aquatic life. But the court found that "these 'benefits,' while related to waterways used by ARTCO, fall far short of the benefits that might be enjoyed by a firm sending its trucks to use the roads of this state." *ARTCO* at 1093-94. Thus, there was no fair relation between the use tax and the benefits ARTCO received from the State for its use of the navigable waterways of the United States. But it also noted:

> Furthermore, ARTCO "paid" for the benefits of civilized society and clean water that the State provided. The harbor service tugs, which remained almost exclusively in Illinois, used fuel purchased

> in Illinois and paid the use tax. Thus, the portion of ARTCO's fleet that received the benefits that the State provided has also contributed to the coffers of the State.

Id. at 1094.

A dissent filed in *ARTCO* criticized the majority for its narrow focus on whether Illinois provided any actual services to the line haul tugboats. It stated:

> The "fair relation" prong of the *Complete Auto Transit* test requires only that the tax be fairly related to the taxpayer's presence or activities in the State. . . . I believe that the line haul tugboats' significant presence in Illinois waters, coupled with the State's provision of navigable waterways, emergency services, and access to the judicial system, among other benefits, justify the imposition of the use tax upon the line haul tugboats.

Id. at 1095.

The situation in *ARTCO* is not identical to this one because of the physical presence in Missouri of Louisiana Dock. Even in *ARTCO,* the court noted that the company paid for the benefits of civilized society conferred upon it by the State of Illinois through the use taxes its harbor boats paid on their fuel. Here, Petitioners seek to avoid all sales and use taxation by the State of Missouri.

We find the analysis of the Tennessee court of appeals in *TECO Barge Line, Inc. v. Wilson,* 2010 WL 2730591 (Tenn. Ct. App. 2010) to be more apt. The *TECO* court found both sufficient nexus and fair relation to services provided by the State for property tax purposes in a case involving a water transportation carrier company that operated tugboats and barges for hire in the Mississippi and Tennessee Rivers within the state of Tennessee. TECO was not domiciled in Tennessee and did not own or lease any real property within Tennessee. It asserted that it derived "no benefits from state and local governments in its Tennessee operations with very few sporadic exceptions," *id* at *7, and that it did not stop, take on crew or provisions, or receive repair or maintenance services in Tennessee. The court found that TECO's "actual use or nonuse

of these services is irrelevant to the inquiry. So long as there is some service or benefit provided by the State and the tax levied is apportioned to the extent of the contact with the State the tax does not run afoul of the Commerce Clause." *Id.* (internal citations omitted).

Petitioners distinguish *TECO*. They note that it is a case involving property tax, not sales and use tax; that the evidence in TECO was that the petitioner received "indirect" benefits from Tennessee, while the evidence in this case is that ACBL receives no benefits from Missouri; and that Tennessee has a statutory exemption for taxes on the sale of tangible personal property delivered to commercial marine vessels midstream in geographical boundary waters for use by those vessels.

The fact that *TECO* involves property tax rather than sales or use tax is inconsequential. The taxes Missouri seeks to impose in this case are on the sales and use of tangible personal property *that occur in Missouri*. Tennessee's statutory exemption is likewise irrelevant, except to prove the point that state legislatures have the ability to exempt such sales if they wish to do so.

Petitioners' argument that ACBL receives "no" benefits from the State of Missouri deserves more attention. In support, they cite the testimony of Judy Hupp, Petitioners' Director of Tax, but they misrepresent her testimony. At the hearing, Hupp was asked a series of questions about the Petitioners' operations and the maintenance of the river. After testifying about the extensive role of Louisiana Dock in these operations, she was asked:

> Q: Okay. Does ACBL receive any services *directly* from the State of Missouri, for example?
>
> A: No.

Tr. 27 (emphasis added). Furthermore, as previously noted, ACBL, CBL, and Louisiana Dock are all one taxpayer for federal tax purposes, and also under Missouri law pursuant to § 347.187.2.

There is, as Petitioners note, a distinction between "no benefits" and "no direct benefits." But they have not established the former; in fact, through the undisputed role of Louisiana Dock in Petitioners' operations and transactions, they have established that ACBL does indeed receive indirect benefits from the State of Missouri.

Furthermore, the amount of the benefits need not be tied to the amount of the tax. In *Commonwealth Edison Company v. Montana,* 453 U.S. 609 (1981), a case concerning Montana's severance tax on coal mined in the state, including on federal land, the company argued that the tax was not fairly related to the costs incurred by the state as a result of the mining. The court rejected its challenge, holding:

> **The relevant inquiry under the fourth prong of *the Complete Auto Transit* test is not as appellants suggest, the *amount* of the tax [or] the *value* of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities.** Rather, the test is closely connected to the first prong of the *Complete Auto Transit* test. Under this threshold test, the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. . . . Beyond that threshold requirement, the fourth prong of the *Complete Auto Transit* test imposes the additional limitation that **the *measure* of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a "just share of state tax burden."**

Id. at 625-26 (bold emphasis added). Here, the measure of the tax is reasonably related to the extent of the contact: the tax is levied only on sales or use of tangible personal property that occur in Missouri.

The 2012 order also relies on *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977). The National Geographic Society was domiciled in Washington D.C., and ran its mail order business selling maps and globes from that office. It operated two offices in California with employees who solicited business for the magazine only, not the mail order business. National Geographic represented that its contacts with customers in

California were related to the mail order sales only by means of common carrier or mail. Thus, it argued, in order for California to require it to collect use tax, there needed to be nexus not only between the taxing state and the seller itself, but also between the taxing state and the seller's *activity* within the state. The court rejected the notion that the *transaction itself* required sufficient nexus and connection with services provided by the State – it was enough that the *entity on whom the tax was imposed* had such nexus and connection. Here, the presence of Louisiana Dock and its identity, for tax purposes, with ACBL, provides both the nexus and the connection.

Petitioners argue that neither case is apposite for the following reasons:

> *Commonwealth Edison v. Montana,* 453 U.S. 609 (1981) is also distinguishable because that case involved a Montana severance tax that was imposed on coal that was actually mined in Montana. *National Geographic Society v. California Board of Equalization,* 430 U.S. 551 (1977) is likewise inapplicable because that case involved a situation in which a single taxpayer with substantial nexus in California was deemed to be taxable on its California sales, even though the taxpayer's nexus creating activity had nothing to do with the taxpayer's California sales. That factual situation is inapplicable to a situation in which an Indiana company makes purchases from Kentucky and Illinois companies where the property is delivered, **and title and ownership of the property pass, to the Indiana taxpayer "*outside of Missouri"* in navigable waters that are maintained and controlled by the United States government. Missouri may have jurisdiction over CBL through its Louisiana Dock division, but it does not have the constitutional jurisdiction to tax an ACBL transaction that takes place entirely *outside of Missouri.***

Petitioners' Opening Brief at 9 (emphasis added). But this argument is founded on an inaccurate statement. It is true that the transactions at issue in this case take place in navigable waters that are maintained by the United States, but as previously discussed, this does not mean they take place "outside of Missouri." In this case, the Director has assessed taxes on transactions that he

believes took place on the portion of the Mississippi River that is within Missouri's territorial boundaries pursuant to § 7.001.

Petitioners have a physical presence in Missouri through the presence of Louisiana Dock, a wholly owned subsidiary and disregarded entity. This provides both sufficient nexus and services to the Petitioners. In addition, many of the deliveries at issue were made first to Louisiana Dock because the vendors either were not capable of delivering to boats midstream, or because it was more convenient for them to do so. In other words, not only do Petitioners have a closely related entity firmly planted on shore in Missouri, that entity plays an indispensable role in many of these transactions. As a business located in Missouri, Louisiana Dock enjoys access to roads maintained by the State of Missouri, the legal system of the State of Missouri, fire and police protection provided by the State of Missouri, and perhaps other services as well. Petitioners have a substantial nexus with the State of Missouri, and the Commerce Clause does not bar taxation of the transactions in which Louisiana Dock plays a crucial role. Even as to those transactions in which Louisiana Dock is not directly involved, the fourth prong of *Complete Auto Transit* is satisfied under the reasoning of *Commonwealth Edison* and *National Geographic Society v. California Board of Equalization.* The Commerce Clause does not bar the assessment of sales and use tax on the transactions in which title passed or goods finally came to rest in Missouri.

III. The Maritime Security Act

Petitioners argue that 33 U.S.C. § 5(b) bars these assessments. This provision was added by the Maritime Transportation Security Act of 2002 ("the Maritime Security Act") to the Rivers and Harbors Appropriation Act of 1884. It provides:

> **(b)** No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any

> non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for --
>
> **(1)** fees charged under section 2236 of this title;
>
> **(2)** reasonable fees charged on a fair and equitable basis that--
>
> **(A)** are used solely to pay the cost of a service to the vessel or water craft;
>
> **(B)** enhance the safety and efficiency of interstate and foreign commerce; and
>
> **(C)** do not impose more than a small burden on interstate or foreign commerce; or
>
> **(3)** property taxes on vessels or watercraft, other than vessels or watercraft that are primarily engaged in foreign commerce if those taxes are permissible under the United States Constitution.

The amendment codified the common law concerning the Commerce and Tonnage Clauses of the United States Constitution. *See Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 566 F.Supp.2d 81, 102 (D. Conn. 2008); *Moscheo v. Polk County*, 2009 WL 2868754, *15 (Tenn. Ct. App., Sept. 2, 2009). "33 U.S.C. § 5(b), like the Commerce and Tonnage Clauses, prohibits **levying fees on the use of navigable waters**." *Alaska Dep't of Natural Resources v. Alaska Riverways, Inc.* 232 P.3d 1203, 1222 (AK Sup. 2010) (emphasis added).

In support of their position, Petitioners rely on portions of the statute and its legislative history, and two Tennessee decisions, *High Country Adventures, Inc. v. Polk County*, 2008 WL 4853105 (Tenn. App., Nov. 10, 2008) and *Moscheo.*

Petitioners first argue that the plain meaning of 33 U.S.C. § 5(b) is that "'No taxes' means *no taxes."* Petitioner's Opening Brief at 10. But this argument commits the common error of not reading to the end of the sentence. 33 U.S.C. § 5(b) bars taxes "*upon or collected*

from any vessel or other water craft, or from its passengers or crew." Missouri's sales and use taxes are not assessed upon the barges or their crews.

Petitioners also rely on excerpts from the legislative history of the Maritime Security Act. The statute's sponsor said that § 5(b) provides "the sole circumstances when a local jurisdiction may impose a tax or fee on vessels." 148 *Cong. Rec.* at E2144. Again, the taxes at issue here are not taxes on "vessels." Moreover, in the same speech, the sponsor also remarked:

> [The proposed legislation] addresses the current problem, and the potential for greater future problems, of local jurisdictions seeking to impose **taxes and fees on vessels merely transiting or making innocent passage through navigable waters** subject to the authority of the United States that are adjacent to the taxing community.

148 *Cong. Rec.* E2143-04 (emphasis added). The sales and use taxes at issue here were not assessed merely because the vessels were making "innocent passage" up the Mississippi river; they were assessed on the purchase of tangible personal property.

Petitioners place great stock in *High Country* and *Moscheo,* both decisions of the Tennessee Court of Appeals dealing with a county "privilege tax," which is a tax levied "upon the privilege of a consumer participating in an amusement" (the "Tennessee privilege tax"). Both decisions concluded that the county's attempt to levy the Tennessee privilege tax on the taxpayer's customers for using whitewater rafts on a Tennessee river that was a navigable water of the United States violated 33 U.S.C. §5(b).

In the 2012 order, we discussed another case construing 33 U.S.C. § 5(b), *Reel Hooker Sportfishing, Inc. v. State Department of Taxation,* 236 P.3d 1230 (Hawai'i App. 2010). *Reel Hooker* concerned Hawaii's general excise tax ("GET") imposed on the privilege of doing business in the state – regardless of the nature of the business. The Hawaii Supreme Court

described the GET as "a gross receipts tax on the privilege of doing business in Hawaii." *In re Tax Appeal of Baker & Taylor, Inc. v. Kawafuchi,* 103 Hawaii 359, 365, 82 P.3d 804, 810 (2004). *Reel Hooker* distinguished Hawaii's GET from the Tennessee privilege tax as applied in *High Country and Moscheo* on the basis of the taxed activity: the privilege of doing business in the state vs. the privilege of rafting on a navigable waterway. We considered the distinction persuasive, as the sales and use taxes here are imposed on the business of selling, or of storing, using or consuming tangible personal property within this state, not on the barges or their passage through Missouri's portion of the Mississippi River.

Petitioners now argue that the Tennessee privilege tax is closer in nature to the sales and use taxes at issue here than the excise tax in *Reel Hooker*:

> But the Tennessee privilege tax on customers participating in whitewater rafting is no different in substance from the Missouri sales tax imposed on the sale of tickets for excursions on riverboats. *See Lynn v. Director of Revenue,* 689 S.W.2d 45, 46-48 (Mo. banc 1985); § 144.010.1(11)(a) RSMo ("sale at retail" includes sales of admission tickets to places of amusement, entertainment and recreation). Hawaii's excise tax operates more in the nature of an income tax; the tax base for a gross receipts tax, however, is the "gross proceeds" from the business operations rather than the "net income" from such operations.

Petitioner's Opening Brief at 12-13.

This argument, too, is flawed. The Missouri sales tax law imposes a tax on sales of tangible personal property at retail. Section 144.010(11)(a) provides that "where necessary to conform to the context . . . the term "sale at retail" shall be construed to embrace "sales of admission tickets, cash admissions, charges and fees to or in places of amusement, entertainment and recreation[.] Petitioners are correct that sales of tickets to whitewater rafting, if sold in Missouri, would be sales at retail subject to sales tax. If the ticket was for whitewater rafting on the Mississippi River (or any other excursion on a navigable water of the United States),

33 U.S.C. § 5(b) might bar its taxation.[12] But that is not what the State of Missouri seeks to tax here.

The pivotal issue in all these cases is *what is being taxed*. The tax at issue in the Tennessee cases was a tax levied upon "the privilege of a consumer paying consideration for admission for an amusement . . . Such tax so imposed is a privilege tax upon the consumer enjoying the amusement[.]" *High Country Adventures* at *1; *Moscheo* at *1. In those cases, the tax was imposed on the privilege of rafting on a navigable water of the United States. The tax at issue in *Reel Hooker* was a general excise tax levied, assessed and collected upon "every person engaging or continuing within the State in any service business or calling including professional services not otherwise specifically taxed." *Reel Hooker* at 1234. Missouri seeks to impose the sales tax, which is "levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable services at retain in this state," § 144.020, RSMo Supp. 2012, and the use tax, which is "imposed for the privilege of storing, using or consuming within this state any article of tangible personal property." Section 144.610.1.

Missouri's sales and use taxes are not "taxes, tolls, operating charges, fees, or other impositions" on Petitioners' vessels. They do not represent an effort by the State of Missouri to impose taxes and fees on "vessels merely transiting or making innocent passage" through the portion of the Mississippi River within Missouri's borders. They are taxes on tangible personal property purchased or used in Missouri. The Maritime Security Act does not bar these assessments.

[12] We express no opinion on the merits of such a position.

IV. Section 32.053

Petitioners argue that even if their other arguments fail, the Director has changed his views on the issue of taxability of transactions that occur midstream on the Mississippi River. Therefore, his policy has changed, and the change should be applied only prospectively under § 32.053, which provides:

> Any final decision of the department of revenue which is a result of a change in policy or interpretation by the department effecting a particular class of person subject to such decision shall only be applied prospectively.

Thus, they reason, even if future, similar transactions are taxed, those at issue in this case should not be. Petitioners base this argument on *Patton-Tully*.

As previously discussed, *Patton-Tully* does not compel a determination that the transactions that occurred on the Mississippi River did not take place in Missouri, or that they were necessarily exempt from sales tax as export sales. It is distinguishable in a number of ways from the instant case. *Patton-Tully* does not prove Petitioners' contention that the Director has "changed its policy or interpretation," and Petitioners could not justifiably rely on it to excuse their failure to pay sales and use tax, or to file use tax returns. Section 32.053 does not apply.

V. Statutes of Limitations

Sections 144.220 and 144.720 are statutes of limitation for sales and use tax assessments. Section 144.220 provides:

> 1. In the case of a fraudulent return or of neglect or refusal to make a return with respect to any tax under this chapter, there is no limitation on the period of time the director has to assess.
>
> * * *
>
> 3. In other cases, every notice of additional amount proposed to be assessed under this chapter shall be mailed to the person within three years after the return was filed or required to be filed.

Section 144.720 makes the same limitations period and provisions applicable to use tax.

Petitioners contend that the assessments in this case were made more than three years after the expiration of waivers signed by CBL, and that CBL reasonably and in good faith believed it did not have to file any sales and use tax returns. Citing *Lora v. Director of Revenue,* 618 S.W.2d 630, 634 (Mo. 1981), *Hewitt Well Drilling & Pump Service, Inc. v. Director of Revenue,* 847 S.W.2d 795, 798 (Mo. banc 1993), and *Odorite of America, Inc. v. Director of Revenue,* 713 S.W.2d 833, 838 (Mo. banc 1986), they claim that CBL did not "neglect" or "refuse" to file such returns. In particular, they claim that the Director's initial letter to CBL on September 28, 2008, informing the company it had no sales or use tax liability, excuses it from the charge that it neglected or failed to file a return. The Director does not address Petitioners' last point, but also relies on *Hewitt* to support his position that his assessments are not barred.

In *Odorite,* the taxpayer provided the Director with information concerning its business activities in 1970 and sought assistance from the Director in determining whether it was exempt from sales tax. The taxpayer subsequently received a tax-exempt letter from the Director. There were exchanges of information in 1974 and 1975 as well. An audit conducted in 1977 concluded the taxpayer owed sales tax for the period from 1972 to 1976, and the Director assessed the taxpayer on October 27, 1977. The taxpayer protested that the assessments for the period prior to October 27, 1975[13] were time-barred. The court concluded that under these circumstances, the taxpayer did not consciously refuse to file returns, and the statute of limitations barred the earlier assessments.

In *Lora,* the Director had changed his regulations regarding the taxability of receipts from a miniature golf course effective April 30, 1974. Relying on the previous regulations, the taxpayer, a "housewife unschooled and inexperienced," had not filed returns. 618 S.W.2d. at 632. On January 11, 1979, the Director assessed sales tax on the taxpayer's business from

[13] At that time, the statute of limitations was two years.

May 1, 1974 through September 30, 1978. The court ruled for the taxpayer on the statute of limitations issue. Based on her "reasonable belief" and lack of actual knowledge, the court held that the taxpayer's failure to file returns following a departmental policy change was not "neglect."

But in both *Hewitt* and *Bridge Data Co. v. Director of Revenue,* 794 S.W.2d 204 (Mo. banc 1990)(*overruled on other grounds*), the court held that failure to file constituted neglect, at least where the taxpayer did not otherwise disclose its operations to the Department and could not rely on previous decisions and policy of the Department as an excuse for nondisclosure. *Bridge Data* at 208. The *Hewitt* court also emphasized that the belief no tax was due did not excuse neglect in failing to file. Both courts emphasized that the taxpayers should have disclosed their transactions in some manner so that the director could audit them and review their legal status.

Petitioners argue that they had good reasons not to file sales or use tax returns. They rely on this Commission's decision in *Patton-Tully,* an argument we have already rejected. They also contend they disclosed their operations to the Director in 1998 when they registered Louisiana Dock for sales and use tax and informed the Director that Louisiana Dock would file sales and use tax returns on behalf of its top-level member. In 1998 the top-level member was ACLH; in 2007 Louisiana Dock changed its registration to reflect that CBL was the owner.

This would have informed the Director of those facts. But while Louisiana Dock filed sales and use tax returns after that, those returns did not accurately reflect the transactions of its owner or its affiliates, because both Louisiana Dock and ACBL provided inaccurate exemption certificates to vendors. Under these circumstances, we do not find that Petitioners accurately disclosed their transactions so as to put the Director on notice of any issues regarding their taxability.

Petitioners also argue that CBL had good reason not to file any returns after it received the September 28, 2008 letter from the Director informing it that it had no sales or use tax liability. On its face, this would seem to excuse CBL's failure to file returns, at least from the period from September 24, 2008 to the date of the Director's assessments against that company. But during this same period, the Director had audited ACBL, and had issued a letter to that company dated September 15, 2008 – nine days before the letter to CBL – outlining ACBL's sales and use tax liability. Pursuant to § 347.187.2, the companies share an identity for sales and use tax purposes. Thus, the Director's September 15, 2008 letter not only put CBL on actual notice of its sales and use tax liabilities, but provided legal notice to it as well.

Petitioners acknowledge this shared identity by acknowledging that under this statute, the waivers of the statute of limitations signed by Louisiana Dock were effective for them as well. The assessments of ACBL were, likewise, effective against CBL. The letter to CBL, issued six months prior to the assessments against ACBL, did not obviate that liability or excuse some entity within the ownership group from filing returns. Petitioners bear the burden of proof on this as well as the other issues in this case. *Hewitt*, 847 S.W.2d at 798. They have not carried that burden.

VI. Petitioners' Liability

A. Use Tax

We have determined that the goods finally came to rest and title passed when they were delivered to ACBL's boats on the Mississippi river, although we acknowledge that we lack evidence as to whether the boats were on the Missouri side of the river when those events occurred. Petitioners have repeatedly made the point that they lack that evidence as well, and their implication is that because it is impossible to determine, these purchases should never be subject to sales or use tax by any jurisdiction. But this premise is flawed. It seems logical to

adopt a method such as that adopted by the State of Illinois, a rebuttable presumption that deliveries to northbound boats occur in Illinois, and those to southbound boats occur in Missouri. We invited Petitioners to propose such a method, but they declined to do so. In such case, we must make as close an approximation as we can, resolving any doubts "against [the taxpayer] at whose door the uncertainty can be laid." *Kansas City Power and Light Co.* at 533.

The Director's audit yielded the following results for taxable purchases during the audit period:

	Amount	Tax Rate[14]	Tax
St. Charles Co., non-food:	4,043.11	.05825	235.51
St. Charles Co., food:	389,741.93	.02725	10,620.47
St. Louis City, non-food:	691,237.20	.06950	48,040.99
St. Louis City, food:	511,286.10	.03850	19,684.51

All the "St. Charles" deliveries were made by Economy. Illinois assessed its own use tax on those purchases if the boats were northbound. Accordingly, the Director assessed Missouri use tax only on the goods delivered to the southbound boats. We adopt that method and uphold those assessments.

Of the St. Louis City food purchases, $24,692.43 were from Petter, and $486,593.67 were from Economy. We uphold the tax assessments on the Economy purchases: $18,733.85. The Director assessed use tax of $961.05 on the Petter purchases. Reasoning that ACBL's boats travel north and south on the Mississippi River and find themselves on the east and west sides of the river with roughly equal frequency, we divide the amount in half and assess $480.53 in tax on those purchases. We apply the same reasoning and methodology to the St. Louis City non-

[14] The record indicates that the tax rates of St. Charles County and the City of St. Louis may have changed slightly during the audit period, but we have insufficient evidence to know when the changes took place. We adopt the lowest rates in the record for purposes of making our calculations.

food purchases, which are not broken out by company in the record. Half of $48,040.99 is $24,020.50. The total amount of use tax, therefore, is:

$235.51 + $10,620.47 + $18,733.85 + $24,020.50 = **$53,610.33.**

B. Sales Tax

We adopt the same admittedly crude methodology set forth above with regard to the Director's sales tax assessments of $9,809.63. The assessments were made on purchases by ACBL from Louisiana Dock. Again, we assume that the deliveries were made to the boats on the east and west sides of the Mississippi River with roughly equal frequency. We divide $9,809.63 in half to yield a principal sales tax amount of **$4,904.82.**

C. Additions and Interest

The Director assessed additions to tax in the amount of 5%. Petitioners did not address the issue of additions at the hearing or in their written argument, and we have found that their failure to file returns was not excused by *Patton-Tully.* We see no reason that the Director's additions were not reasonable. The total tax due as calculated above is **$58,515.15.** Five percent of that amount is $2,925.76. Interest applies as a matter of law. Section 144.170.

Summary

Petitioners owe $58,515.15 in sales and use tax; $2,925.76 in additions; and interest as provided by law.

SO ORDERED on May 13, 2013.

\s\ Karen A. Winn
KAREN A. WINN
Commissioner